UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

TOWNE BUS, LLC,

Employer

and Case No. 29-RC-10085

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

Petitioner

and

AMALGAMATED TRANSIT UNION, LOCAL 1181, AFL-CIO

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record evidence reveals that Towne Bus, LLC ("Employer"; "Towne LLC"), is a domestic limited liability corporation with its principal office and place of business located at 303 Sunnyside Boulevard, Plainview, New York, and an additional

facility located at 875 Waverly Avenue, Holtsville, New York ("the Waverly facility"; "the Waverly yard"). The Employer provides transportation services to the Sachem Central School District, in Holbrook, New York, which entity, in turn, purchases and receives at its Holbrook facility, goods and materials valued in excess of $5,000 annually from firms located outside the State of New York. Based on a projection of its current earnings, the Employer's gross annual revenues will exceed $250,000.

Based on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Transport Workers Union of America, AFL-CIO, herein called the Petitioner, seeks to represent a unit of all full-time and regular part-time drivers and matrons employed at the Employer's Waverly facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

Introduction

In the spring of 2003, the Employer entered into an agreement, effective July 1, 2003, to assume Montauk Bus Service, Inc.'s contract to provide school bus transportation services to the Sachem school district. The Employer acquired Montauk Bus Service, including the Waverly yard, on July 1, 2003. A majority of the Employer's

drivers and matrons at the Waverly yard are former employees of Montauk Bus, who are staffing the same Sachem school district routes that they were previously assigned as employees of Montauk Bus. The record does not reflect whether the Employer has other customers, or when it was incorporated.

We Transport, Inc., Towne Bus Corp., Towne Coach Tours, Inc., and We Transport, LP, herein collectively called the Companies, are also in the business of providing bus transportation services. The Companies' operating yards and repair facility are in Holbrook, Smithtown, Elmont, Ronkonkoma, and at other locations in Nassau and Suffolk counties, Long Island, New York. The Companies' main office, like that of the Employer, is located at 303 Sunnyside Boulevard, Plainview, New York.

A collective bargaining agreement between the Companies and the Amalgamated Transit Union, Local 1181, AFL-CIO, herein called the Intervenor or Local 1181, effective July 1, 2001, through June 30, 2004, covers the Companies' drivers, mechanics, fuelers, cleaners and driver-assistants, at its various operating yards. The Employer is not a party to this collective bargaining agreement.

Prior Petitions to Represent the Waverly Employees

On May 19, 2003, the Petitioner filed a petition in Montauk Bus, Case No. 29-RC-10038, to represent the drivers and matrons at the Waverly facility. The petition was withdrawn on June 3 in light of the Employer's imminent plans to purchase the Waverly facility from Montauk Bus.

On July 2, 2003, the Petitioner filed a petition in Towne Bus, Case No. 29-RC-10058, to represent the same bargaining unit: the drivers and matrons at the Waverly

facility. It was withdrawn on July 10, on the understanding that the Employer had not yet staffed the Waverly facility.

Positions of the Parties

The Employer and Intervenor make the following arguments (with the Petitioner taking the contrary position): (1) The Employer is not the employing entity; (2) the Employer and the Companies are a single integrated enterprise; (3) the petition is barred by the collective bargaining agreement between the Companies and the Intervenor; (4) the petition is barred by the Employer's recognition of Local 1181 as the bargaining representative of the Waverly employees, (5) the petitioned-for Waverly unit is an accretion to the pre-existing bargaining unit, consisting of the Companies' drivers, mechanics, fuelers, cleaners and driver-assistants; and (6) the authorization cards submitted by the Petitioner, in connection with a prior petition naming Montauk Bus Service, Inc., the predecessor employer, are stale.

Based on the record evidence and applicable law, I have concluded that all of these arguments lack merit. Accordingly, I am directing an election in the petitioned-for unit.

Witnesses

Four witnesses testified at the hearing: Jerome Marksohn, the Employer's president; Nicholas DeFino, Jr., a Local 1181 organizer and business representative; Denise Vara,[1] a school bus driver at the Waverly facility since 1999 who was on the Petitioner's organizing committee; and Richard Gallagher, transportation supervisor for the Sachem School District.

[1] The Employer argued in its initial brief that Vara is "incredible," but her testimony was largely uncontroverted.

Status of Towne Bus, LLC, as Employer of the Employees in the Petitioned-for Bargaining Unit

The record contains several documents demonstrating that Towne Bus, LLC, assumed Montauk Bus Inc.'s contract to perform school bus transportation services for the Sachem School District, effective July 1, 2003. These documents include copies of the Assignment of Contract, a purchase order, and invoices, all naming Towne Bus, LLC, as the contractor, and authenticated by Richard Gallagher, transportation supervisor for the Sachem School District. The evidence is undisputed, that this work is performed by the petitioned-for drivers and matrons at the Waverly yard.

Denise Vara who performs bus driving work for the Sachem School District out of the Waverly yard, testified that she is currently employed by Towne Bus, LLC, having previously performed the same work as an employee of Montauk Bus, Inc. Documents authenticated by Vara include copies of her paystubs from Towne Bus, LLC, for the pay periods ending September 12, September 19, and October 3, 2003; an insurance certificate placed in the Employer's buses naming Towne Bus, LLC, as the owner of the vehicles; and a memorandum from Evelyn Johnson stating that "All Sachem Bus Drivers have until July 31, 2003 to apply for a position as a driver at Towne Bus LLC."

The Employer's president, testifying regarding payroll records for the week ending July 25, 2003, admitted that former Montauk employees employed as of that date were on the Towne Bus, LLC, payroll. The Employer failed to comply with a subpoena requiring the production of payroll records from Towne Bus LLC's inception to date. Further, the Employer did not put forward an alternative theory as to which entity employs the petitioned-for employees. Although the stipulation signed at the outset of the hearing named Towne Bus, Inc., as the employing entity, the Employer's counsel

subsequently revealed to the Region that Towne Bus, Inc., does not exist at the present time.

Based on the record evidence, I conclude that Towne Bus, LLC, is the Employer of the employees in the petitioned-for bargaining unit.

Single Employer Issue

The issue of whether or not the Employer and the Companies constitute a single integrated enterprise has no bearing on the determination of whether the Employer's employees constitute a separate appropriate bargaining unit, or whether the Intervenor's collective bargaining agreement with the Companies should be imposed on the Employer's employees. *See Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76 (1977). Moreover, the record is incomplete with regard to the four "single employer" factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *See JMC Transport, Inc.*, 283 NLRB 554, 555(1987). For example, the record is silent with respect to the issue of common ownership; none of the shareholders or partners of the various entities are identified. The record does not disclose the addresses or owners of the seven yards operated by the four Companies, or indicate how work is apportioned among the four Companies and the Employer. There is no evidence that the Employer and the four Companies ever submit joint bids on contracts, subcontract work to one another, or share vehicles or equipment.

Sachem School District transportation supervisor Gallagher indicated that he views Towne Bus, LLC, and We Transport, LP, as interconnected. However, Gallagher also testified that the school district has separate contracts with these two entities, to

perform separate work out of separate yards. Both Marksohn and Gallagher maintained that certain managers work for both the Employer and the Companies. However, the record lacked specificity with regard to the exact titles held by these managers, and the precise relationship between the named managers and the five companies at issue. Moreover, the Employer refused to comply with a subpoena requiring the production, *inter alia,* with respect to both the Employer and all affiliated companies, of documents showing their full and correct names and addresses, and "the names, titles and dates of tenure of all owners, partners, principals, officers, and directors of these companies."[2] Accordingly, I am unable to conclude at this time that the Employer and the Companies constitute a single employer.

Contract Bar

A collective bargaining agreement bars an election only with respect to employees who are clearly encompassed by its terms. *Houck Transport Co*., 130 NLRB 270 (1961); *see Moore-McCormack Lines,* 181 NLRB 510 (1970). In the instant case, the Employer of the petitioned-for employees, Towne Bus, LLC, is not a signatory to the collective bargaining agreement, which was entered into before the Employer acquired the Waverly facility. Thus, the 1181 agreement does not clearly encompass the Employer's employees, and does not, on its face, bar the petition herein.

Recognition Bar

Without a "clear and positive demonstration" of majority status, an employer's extension of recognition to a union is invalid, and does not bar a petition. *Jack L*.

[2] The Employer attempted to introduce a document into evidence, pertaining to the single employer issue, by attaching it to its second brief. Supplemental Brief of Employer at 6 n. 3 and Exhibit C. It is hereby rejected. The proper procedure for offering exhibits into evidence is set forth in the NLRB Representation Case Handling Manual, Section 11224 ("Exhibits").

Williams, 231 NLRB 845 (1977); *see Rollins Transportation System, Inc*., 296 NLRB 793 (1989), *as modified by Smith's Food and Drug Centers, Inc.*, 320 NLRB 844 (1996); *cf. Garment Workers Union (Bernhard-Altmann Texas Corp*.), 366 U.S. 731, 48 LRRM 2251, 2253 (1961)(observing that "[t]here could be no clearer abridgment of Section 7 of the Act" than the recognition of a bargaining agent representing a minority of an employer's employees, "thereby impressing that agent upon the non-consenting majority.")

In the instant case, the record evidence establishes that the majority of the Employer's drivers and matrons are former Montauk Bus employees. The Employer's president, Marksohn, testified that when the school term began in September, 2003, 75 or 80 of the former Montauk Bus employees were on the Employer's payroll, out of a total employee complement of about 120 employees. There is no evidence that the former Montauk Bus employees support Local 1181. Nonetheless, starting in July, and continuing into the fall term, the collective bargaining agreement with Local 1181 was applied to all employees working at the Waverly yard. Accordingly, Local 1181 business representative DeFino told former Montauk employees that they were required to join Local 1181 after 30 days of employment with the Employer.

The record reflects that the Employer's recognition of Local 1181 in July, 2003, was predicated on the temporary assignment of Local 1181 members employed by the Companies (and not by the Employer) to the Waverly yard. At the time of recognition, these 1181 members employed by the Companies constituted the majority of the employees working at the Waverly yard. However, the Employer's president, Marksohn, conceded that he knew at the time of recognition that when the school term began in

September, nearly all of these Local 1181 members would return to their regular locations, primarily at the Smithtown yard. When the school term began, only "a few" of these Local 1181 members continued to work at the Waverly yard.[3]

Thus, the vast majority of these Local 1181 members never became employees of the Employer or members of the petitioned-for bargaining unit. The Employer's recognition of Local 1181, based on the temporary assignment of these Local 1181 members to the Waverly yard, deprived the former Montauk Bus employees who constitute the majority of the Waverly unit of their Section 7 right to select a bargaining representative of their own choosing, rather than having a bargaining representative imposed upon them.

My conclusion that the Employer's recognition of Local 1181 was premature, and does not bar an election herein, would not be altered by a finding that the Employer and Companies are a single employer. The Board has held that if an employer transfers a number of union-represented employees in a pre-existing bargaining unit to a new, non-union location, no bargaining obligation exists absent a showing that the majority of the employees in the unit at the new facility are transferees from the original bargaining unit. *Gitano Group, Inc.*, 308 NLRB 1172, 1175 (1992); *see ATS Acquisition Corp., Inc.*, 321 NLRB 712, 713 (1996). In this regard, the Board stressed that "the correct focus balanc[es] the rights of the new employees against those of transferees to the new location." *Gitano*, 308 NLRB at 1175. Here, the majority of the petitioned-for unit consists of former Montauk employees, rather than transferees from the original Local 1181 bargaining unit.

[3] At one point, Marksohn testified that "about two dozen" of the Local 1181 members continued to work at the Waverly yard after the school term began.

Accretion

It should first be noted that an accretion cannot be found where it involves adding employees of one employer, i.e., the Employer, to a unit of employees of another employer, i.e., the Companies. However, even if the Employer and the Companies were to be found to be a single employer, it would be inappropriate to accrete the petitioned-for employees to the existing bargaining unit represented by the Intervenor. In determining whether a new group of employees is an accretion to an existing bargaining unit, the Board "gives special weight to the interests of the unrepresented employees in exercising their own right to self-organization." *Save-It Discount Foods*, 263 NLRB 689, 693 (1982); *see Melbet Jewelry Co., Inc., and I.D.S.-Orchard Park Inc*., 108 NLRB 107, 109 (1969)(declaring that "very effectively disenfranchising" employees of a new store by accreting them to the pre-existing unit would "do serious violence to the mandate that employees' rights are to be protected and that appropriate unit findings under Section 9(b) must be designed to preserve those rights"). In a recent case, the U.S. Court of Appeals for the 4th Circuit, in finding that the Board "failed to follow its usually cautious [accretion] standard," summarized the Board's traditional approach as follows:

> Because the accretion doctrine is in considerable tension with the statute's guarantee of employee self-determination, the Board has historically favored employee elections, reserving accretion orders for those rare cases in which it could conclude with great certainty, based on the circumstances, that the employees' rights of self-determination would not be thwarted. Thus, the Board enters an accretion order only when the accreted employees have an insufficient group identity to function as a separate unit and their interests are so closely aligned with those of the preexisting bargaining unit that the Board can safely assume that the accreted employees would opt into that unit if given the opportunity.

Baltimore Sun, 257 F.3d 419, 427 (2001)(citations omitted). In close cases,

> "when the relevant considerations are not free from doubt," the Board and courts are in agreement that "it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion" because "as a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit."

Save-It, 263 NLRB at 693 (quoting *Westwood Import Company, Inc*., 251 NLRB 1213, 1220 (1980)(quoting *Westinghouse Electric Corp*., 440 F.2d 7, 11 (1971), and cases cited therein)).

The Board and courts have been careful to draw the distinction between the showing required for a finding of accretion and that required for a finding that a petitioned-for unit is appropriate:

> While a mere finding of a "community of interest" among affected employees may be sufficient to justify the Board's action in defining a unit to conduct a representation election, a decision to accrete employees to a unit *without an election* requires a showing of much more. Accordingly, the Board has determined that it may issue an order to accrete employees to a preexisting bargaining unit only when the employees have "little or no separate group identity and thus cannot be considered to be a separate appropriate unit" *and* the community of interest between the employees and the existing unit is "overwhelming."

Baltimore Sun, 257 F.3d at 427, and cases cited therein (emphasis in original); *see Sara Lee Bakery Group*, 296 F.3d 292, 297 (4th Cir. 2002). It therefore follows that, "[b]ecause the Board's discretion in selecting an appropriate bargaining unit for an election is broad, that same breadth correspondingly narrows its discretion in accreting employees because, under the Board's accretion rule, any employees that could appropriately be a separate unit cannot be accreted to another unit." *Baltimore Sun*, 257 F.3d at 430. Thus, even though an Employer-wide bargaining unit "may be appropriate if the issue is raised in the context of a petition for a representation election, the Board will not, 'under the guise of accretion, compel a group of employees, who may constitute a

separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.'" *Save-It,* 263 NLRB at 693 (1982)(citing *Melbet Jewelry*, 180 NLRB at 110). Notably, the "presumption is in favor of petitioned-for single facility units, and the burden is on the party opposing that unit to present evidence overcoming the presumption." *J & L Plate, Inc*., 310 NLRB 429 (1993)

The most important factors in determining whether employees should be accreted to an existing unit, without an election, are employee interchange and day-to-day supervision. *Towne Ford Sales*, 270 NLRB 311 (1984); *see Super Valu Stores*, 283 NLRB 134, 136-37 (1987). Day-to-day supervision "is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location." *Towne Ford*, 270 NLRB at 312 (citations omitted). Other relevant factors include the degree of functional autonomy or integration, the level of centralized managerial control, geographical proximity, bargaining history, and similarity of skills, job functions, and working conditions. *Super Valu Stores*, 283 NLRB at 136; *Save-It*, 263 NLRB at 693.

In the instant case, the Employer and Intervenor have failed to establish that the employees have "little or no separate group identity and thus cannot be considered to be a separate appropriate unit," or that "the community of interest between the employees and the existing unit is overwhelming." *See Baltimore Sun*, 257 F.3d at 427.

The Employee Complement

The record reflects that the Employer and the Companies, combined, employ about 1500 employees, including 600 van drivers, an unspecified number of full-time school bus drivers, 130 or 140 spare drivers, an unknown number of driver assistants or matrons (the terms are interchangeable), about 35 dispatchers, and an undisclosed number of safety supervisors, also referred to as "19A certification people."[4] There are a total of eight operating yards. The Employer's drivers and matrons are assigned to the Waverly yard, where they perform transportation services for the Sachem School District. The Companies' drivers and matrons are assigned to the other seven operating yards.

Day-to-Day Supervision vs. Centralized Management

Marksohn acknowledged that the drivers and matrons at each yard are separately supervised by their dispatchers and safety supervisors. The safety supervisors, in turn, report to "Susan," in Plainview. The dispatchers report to Evelyn Johnson, the Suffolk County Operations Director, or to Tom Richardson, who generally "handles" Nassau County. Marksohn testified that Richardson and Johnson can be found at any of the eight yards operated by the Employer and the Companies, at any time. However, there is no evidence to support the Employer's claim, in essence, that over 1,000 employees report directly to these two individuals.[5] The record does not reflect whether "Susan," Johnson, and Richardson are employed by the Employer, the Companies, or both.

According to Marksohn, safety supervisors or dispatchers do not make final disciplinary decisions, but rather, make disciplinary recommendations[6] to "someone like Evelyn Johnson or Tom Richardson and/or Human Resources." Marksohn did not

[4] "19A" refers to the requirements for bus driver certification pursuant to N.Y. Veh. & Traf. Law Section 509-a (McKinney 2003).

[5] Brief of Employer at 8.

[6] Marksohn testified that a school district may also initiate disciplinary action.

provide specific examples, and he conceded that he was unfamiliar with the procedures followed in disciplinary actions.

With regard to hiring, Marksohn testified that job applicants are interviewed in Plainview. When asked, under cross-examination, who conducts these interviews, he responded, "We have people that interview prospective drivers." He did not provide examples, and thus his testimony does not rule out the possibility that hiring interviews are conducted by dispatchers.

Vara testified that she reports to dispatcher Gilda White, who was her dispatcher when she drove for Montauk Bus. Vara testified that White would be the person she would talk to if she had any problems or questions regarding her day-to-day work.

The collective bargaining agreement between the Companies and Local 1181 (Section 5(d)) provides that Step 1 grievances are handled by employees' immediate supervisors. At subsequent stages, grievances are referred to "upper management." This language implies that for the employees of the Companies, "upper management" and the employees' immediate supervisors are not the same people.

In sum, the evidence fails to establish that the drivers and matrons report directly to the top management of the Employer and/or the Companies in their day-to-day work. Rather, the evidence indicates that their immediate supervisors are the dispatchers and safety supervisors at each yard.

Integration of Operations vs. Autonomy

The record indicates that the day-to-day operations of the Waverly facility are separate and autonomous.[7] Marksohn testified that for each yard, there is a separate seniority list and a separate list of routes, from which the drivers pick their runs based on their seniority within the yard. There are two picks per year, in late August for the regular school year (the period running from September through June), and in late June for the summer runs. Petitioner's Exhibit 1, an internal Sachem school district memorandum dated March 5, 2003, indicates that the district expected the Employer to "maintain the seniority of the Montauk Bus Service drivers as a separate entity apart from the contract for Towne Bus drivers (approximately 1,000 bus drivers)." Marksohn admitted that the school district wanted to preserve the seniority of the Montauk Bus Service drivers, so that the same drivers would continue to service the district, retaining the same bus routes as before the Employer's acquisition of the Waverly yard. Accordingly, Vara testified that her seniority date at the Waverly yard is based on her date of hire by Montauk Bus.

Temporary Interchange

The record does not establish that there is a substantial amount of temporary interchange among yards. Marksohn testified that the Employer and the Companies, combined, employ 130 or 140 spare drivers, who fill in for regular drivers who are absent or late. Each spare driver is assigned to a particular yard, and usually covers for the drivers assigned to that particular yard. The spare drivers "probably are on the seniority

[7] Marksohn asserted that the Employer plans to merge the Waverly facility with another yard four miles away. However, there is no evidence that any affirmative steps have been taken to merge the two facilities, or that their operations are integrated in any way at the present time.

list" for each yard. Marksohn claimed that a spare driver "could" work in another yard for the day, but he did not reveal how often this occurs.

Earlier in his testimony, Marksohn also claimed that when the Employer and/or the Companies are "short drivers from a yard," they can "pull" drivers from other locations. However, Marksohn did not know how often a driver for a particular location would work out of another yard, and he conceded that "[g]enerally it would be a spare, you know, because typically it would be a spare."

Gallagher testified that there have been "instances" when Towne Bus, LLC, buses have "come out of either the Holbrook yard or the Smithtown yard," rather than the Waverly yard. However, there is no evidence that these buses were staffed by non-Towne Bus, LLC, drivers and matrons.

Permanent Interchange

Marksohn testified that "a few" employees from other yards were permanently transferred to the Waverly yard in September, 2003. Otherwise, he was unable to approximate the number or frequency of transfers among the eight yards. Local 1181 organizer DeFino contended that there are six transfers per school year, per yard, but he did not indicate whether this statistic applies to the Employer's new operation at the Waverly yard. Neither witness provided any examples of employees who had actually transferred among yards.

Both Marksohn and DeFino maintained that a transfer can take place during the school year at the request of a school district. However, Marksohn testified that transfers usually occur at the beginning of the summer. Section 2(c) of the collective bargaining agreement between the Companies and Local 1181 penalizes employees who transfer

between yards during the school year, between picks, by placing such employees "at the bottom of the seniority list for the remainder of that year, to be slotted in at the next pick." Thus, it appears that frequent transfers are discouraged, at least with respect to the Companies' employees.

In sum, the evidence regarding permanent transfers falls short of demonstrating an "overwhelming" community of interest between the Employer's Waverly employees and the Companies' employees at other yards. (This is predicated, of course, on the claim that the Employer and the Companies constitute a single employer.)

Skills and Functions

The record indicates that the employees at the Companies' seven yards, and the Employer's Waverly yard, perform similar functions, using similar skills. Marksohn testified that school bus drivers require training, CDL licenses, and New York State "19A" certification.[8] Van drivers have different licenses and receive lower rates of pay. The driver assistants, also referred to as matrons, assist the driver and help riders with medical conditions, disabilities, or other issues.

However, the importance of this factor is diminished where employees perform "parallel, as distinguished from integrated, functions." *Save-It*, 263 NLRB at 694. Given the degree of autonomy enjoyed by each yard, combined with the lack of evidence regarding temporary interchange or contacts among employees, this factor is insufficient to establish that the Waverly unit "has no separate identity" as alleged by the Employer and Intervenor.

[8] See N.Y. Veh. & Traf. Law Section 509-a (McKinney 2003).

Geographical Proximity

Marksohn testified that the Employer's Waverly yard, in Holtsville, NY, is three or four miles from the Companies' Holbrook, New York, yard and eight to ten miles from the Companies' Smithtown, New York, yard. He did not testify regarding the distance between Waverly and the Companies' five other yards, or their repair facility. Thus, the evidence regarding geographical proximity is inconclusive. *See Staten Island University Hospital*, 24 F.3d 450 (2nd Cir. 1994)(geographical separation of 8 miles "neither compels nor precludes the NLRB's decision").

Centralization of Administration

Marksohn testified that training courses are administered centrally, in Plainview, for the employees of all eight yards. All drivers are required to take an annual three-hour refresher class before the fall school term begins in September.

In addition, Marksohn testified that the payroll for both the Employer and the Companies is handled at the main office in Plainview, which employs payroll clerks. An outside payroll company, ADP, delivers the paychecks to the Plainview office, which then distributes them to each yard, where the dispatchers hand out the checks to the drivers and matrons. Marksohn stated that if an employee were to have a problem with his or her payroll check, he or she would initially try to resolve the problem with his or her immediate supervisor. The immediate supervisor might then have to contact the payroll department in Plainview.

Marksohn further testified that if an employee from any of the eight yards needs to speak to an HR person regarding benefits, or problems at work, s/he would speak with Mary Prowler in Plainview. The Local 1181 benefits, which are applied to all

employees of the Employer and the Companies, are "tracked" in Plainview by Cynthia Reed, the vice president of administration.

In sum, the evidence reflects some degree of administrative centralization and integration. However, with respect to the accretion issue, the evidence of centralized training, payroll and human resources departments, is outweighed by the lack of evidence that the "core functions" performed by the Employer and the Companies are integrated, or centralized. *See Staten Island University Hospital*, 24 F.3d 450, 456 (2nd Cir. 1994).

Wages and Benefits

The Employer and Intervenor further rely on the fact that the Employer's Waverly employees are receiving the same contractual wages and benefits as those of the Companies' employees, pursuant to the Local 1181 contract. This argument is without merit, inasmuch as it is based on circular reasoning. Essentially, the Employer and Intervenor are arguing that the wages and benefits set forth in the Local 1181 contract should be imposed on the Waverly employees, without an election, because the Employer and Intervenor have taken it upon themselves to impose these wages and benefits on the Waverly employees, without an election. The record does not indicate what the Waverly employees' wage rates and benefits were before the Local 1181 contract was applied to them. That these wages and benefits were different from those in the Local 1181 contract is implied by an internal Sachem school district memorandum, dated March 5, 2003 (Petitioner's Exhibit 1), stating that "John Mensch [president of Montauk Bus] and Carmen Tomeo [vice president of operations for Towne Bus, LLC] concur that the drivers shall receive the same level of pay and benefits as currently afforded them."

Summary and Conclusion

The petitioned-for unit employees at the Waverly facility are separately supervised by the Waverly dispatchers and safety supervisors, including a dispatcher who previously worked for Montauk Bus. The unit employees have a separate Waverly seniority list used for picking their runs, from a separate list of Waverly routes. These routes are substantially the same routes that were assigned to the unit employees prior to July 2003, when they were employed by Montauk Bus. Further, the Waverly yard has its own separate group of spare drivers, who fill in for the full-time Waverly drivers when they are absent. The evidence regarding permanent transfers is lacking in specificity. In light of these factors, particularly the crucial factors of direct supervision and employee interchange, the Employer has failed to prove that the petitioned-for Waverly employees have an overwhelming community of interest with the employees at the Companies' seven yards, or that the identity of the Waverly employees has been so submerged in that of the pre-existing Local 1181 bargaining unit as to obliterate their ability to function as a separate bargaining unit. Accordingly, I find that the petitioned-for Waverly employees constitute a separate appropriate unit, and are not an accretion to the pre-existing Local 1181 bargaining unit.

Showing of Interest

The Employer takes the position that the Petitioner's showing of interest, submitted in connection with Montauk Bus, 29-RC-10038, is stale. However, cards executed by employees of a predecessor remain valid as to a successor employer. *Pantex Towing Corporation*, 258 NLRB 837, 846 (1981); *Unit Train Coal Sales, Inc*., 234 NLRB 1265, 1270 (1978); *see NLRB v. Burns Security Services, 406 U.S. 272, 80 LRRM*

225 (1972). Moreover, it is well-settled that "the 30 percent showing of interest requirement is a purely administrative matter, designed to determine whether enough employees want an election to warrant expenditure of the Board's resources. It is not statutorily required, nor is it intended to create a right in any party to protest the conduct of an election." *River City Elevator Co., Inc*., 339 NLRB No. 82, slip op. at 3 (2003)(*citing Amos-Thompson Corp*., 49 NLRB 423, 427 (1943)).

Summary of Findings

I find that Towne Bus, LLC, is the employing entity, and that the petitioned-for unit is not an accretion to the pre-existing unit consisting of employees of We Transport, Inc., Towne Bus Corp., Towne Coach Tours, Inc., and We Transport, LP ("the Companies"). Further, I find that the petition is not barred either by the collective bargaining agreement between the Companies and the Intervenor, or by the Employer's recognition of the Intervenor at the Waverly location. Accordingly, I will direct an election in the petitioned-for unit. I find the following unit to be appropriate for the purposes of collective bargaining:

> All full-time and regular part-time[9] drivers and matrons employed at the Employer's 875 Waverly Avenue, Holtsville, New York, facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether

[9] The Employer employs about 130 or 140 spare drivers, but the record does not reflect how many such spare drivers are employed at the Waverly facility, or what their work schedules are. If any of the spare drivers at Waverly are contingent, on-call, or extra employees who regularly averaged 4 hours or more per week for the last quarter prior to the eligibility date, they have a sufficient community of interest for inclusion in the unit and may vote in the election. *See Davison-Paxon Company*, 185 NLRB 21, 23-24 (1970).

they wish to be represented for purposes of collective bargaining by Transport Workers Union of America, AFL-CIO, or Amalgamated Transit Union, Local 1181, AFL-CIO, or by neither labor organization. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One MetroTech Center North, 10th Floor, Brooklyn, New York 11201, on or before **November 6, 2003.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 13, 2003.** The request may **not** be filed by facsimile.

Dated: October 30, 2003.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

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